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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION,

Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., NEW ENGLAND COALITION ON NUCLEAR POLLUTION and CONSOLIDATED NATIONAL INTERVENORS, INC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Vermont Yankee Nuclear Power Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 21, 1976.

OPINIONS BELOW

In the separately bound appendix submitted herewith are set forth the opinion of the United States Court of Appeals for the District of Columbia Circuit (Bazelon, C.J.) in *Natural Resources Defense Council, Inc.* v. *NRC*, Nos. 74-1385 and 74-1586 (*App.*, 1-44), together with the Separate Statement Concurring in Result of Tamm, J. (*App.*, 51-59) and

the Separate Statement of Bazelon, C.J. (*App.*, 45-50). The decision is not yet officially reported. The decisions of the Atomic Safety and Licensing Appeal Board of the then United States Atomic Energy Commission[1] which were on review in No. 74-1385 in the Court of Appeals are reported at 4 AEC 930[2] (*App.*, 60-77) and 7 AEC 159[3] (*App.*, 78-120). The rulemaking proposal, notice of hearing, and notice of promulgation of the rule on review in No. 74-1586 in the Court of Appeals are reported at 37 Fed. Reg. 24191 (Nov. 15, 1972) (*App.*, 121-129), 38 Fed. Reg. 49 (Jan. 3, 1973) (*App.*, 130-132) and 39 Fed. Reg. 14188 (April 22, 1974) (*App.*, 133-148). The General Statement of Policy issued by the Nuclear Regulatory Commission after issuance of the Court of Appeals' decision appears at 41 Fed. Reg. 34707 (Aug. 16, 1976) (*App.*, 149-160).

JURISDICTION

The Judgment of the Court of Appeals was entered on July 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and 28 U.S.C. § 2350.

QUESTIONS PRESENTED FOR REVIEW

1. Does the National Environmental Policy Act of 1969[4] impose procedural requirements upon agency rulemaking beyond those required by the Administrative Procedure Act, 5 U.S.C. § 553?

[1] The United States Atomic Energy Commission was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.*, and its licensing and regulatory functions were transferred to the United States Nuclear Regulatory Commission, *id.*, 88 Stat. 1242, 42 U.S.C. §§ 5841 *et seq.*

[2] *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-56, 4 AEC 930 (1972).

[3] *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159 (1974).

[4] 42 U.S.C. §§ 4321 *et seq.*

2. Can the National Environmental Policy Act of 1969 be construed, consistently with the Atomic Energy Act of 1954[5] and the Energy Reorganization Act of 1974,[6] to require that licensing of nuclear reactors be delayed until such time as the environmental effects of nuclear waste disposal and reprocessing are "thoroughly ventilated" either in connection with licensing individual nuclear reactors or through a generic rulemaking proceeding?

3. Did the Court of Appeals improperly substitute its judgment for the technical expertise of the Nuclear Regulatory Commission on the basis of matters not within the record before the agency?

STATUTES AND REGULATIONS INVOLVED

The case involves the statutes and regulations listed below, the relevant portions of which are set forth in the Appendix bound separately and submitted herewith (*App.*, 159-262).

1. The Administrative Procedure Act, § 553, 5 U.S.C. § 553 (*App.*, 159-160).

2. The Atomic Energy Act of 1954 as amended, 42 U.S.C. §§ 2011 *et seq.* (*App.*, 161-210).

3. The Energy Reorganization Act of 1974, as amended, 42 U.S.C. §§ 5801 *et seq.* (*App.*, 211-257).

4. The National Environmental Policy Act, § 102, 42 U.S.C. § 4332(2) (*App.*, 258-260).

5. 10 C.F.R. § 51.20(e) (*App.*, 261-262).

[5] As amended, 42 U.S.C. §§ 2011 *et seq.*

[6] As amended, 42 U.S.C. §§ 5801 *et seq.*

STATEMENT OF THE CASE

A. Introduction

Fuel reprocessing and waste disposal constitute the "back end" of the fuel cycle[7] for any nuclear power plant. The cycle itself begins with the mining of ore and follows through each stage in the processing and use of the ore, including reprocessing of the spent fuel, and disposal of long lived radioactive waste. The cycle includes activities at a number of different facilities located at separate sites: for example, the uranium mine itself; the nuclear reactor where the fuel is used, electricity produced, and waste generated; and the separate facilities to which waste may be transported from a number of reactors for reprocessing or disposal.

The issue of the environmental effects of fuel reprocessing and waste disposal was raised by intervenors in the proceeding to license petitioner's Vermont Yankee Nuclear Power Station (VYNPS) at Vernon, Vermont. The Atomic Energy Commission (AEC)[8] initially determined in the Vermont Yankee proceeding that environmental questions involving the "back end" of the fuel cycle were not an appropriate subject for litigation in proceedings to license an individual generating plant. Subsequently, while adhering

[7] The term "fuel cycle" refers to the entire course of events which is involved in fueling, and disposing of waste from, a nuclear reactor. Its constituent parts are mining of ore, milling of ore, enrichment (the process by which the proportion of one of the fissile isotopes of uranium (U-235) is increased), fabrication, transportation to the reactor, shipment of spent fuel to reprocessing facilities (where unused fissile isotopes of uranium and plutonium are recovered, as well as U-238), shipment of waste to disposal areas and disposal. The "back end" of the fuel cycle consists of those operations which occur after the use in the reactor. The "front end" encompasses milling through fabrication.

[8] See note 1, *supra*. For the sake of clarity the old designation "AEC" is used where appropriate.

to that view in Vermont Yankee's individual case, the agency nonetheless began rulemaking proceedings (a so-called "generic" rulemaking) to determine how, if at all, the environmental effects of the fuel cycle should be considered in individual reactor licensing proceedings. After notice and a hearing, the agency determined that these effects, though insignificant, were capable of quantification. Therefore, the agency adopted a rule which established numerical values for the environmental effects of fuel reprocessing and long lived waste disposal attendant upon the operation of a single reactor. These values were set out in a table of numerical computations which the agency directed to be included in the environmental statement for each reactor.

Thus both Vermont Yankee's individual licensing proceeding and the generic rulemaking proceeding involved the agency's consideration of procedures and standards to deal with, and ultimate conclusion concerning, the environmental effects of nuclear waste disposal in connection with licensing individual nuclear reactors. The Court of Appeals set aside the agency's rule and remanded the rulemaking for further proceedings. At the same time the Court of Appeals, treating the licensing and rulemaking cases as interrelated, remanded the order authorizing petitioner's license to await the outcome of the reopened rulemaking proceeding.

B. Agency Proceedings With Respect to Petitioner's Nuclear Power Plant

During the course of the proceedings before the AEC Licensing Board[9] with respect to the petitioner's application for an operating license for VYNPS, the Licensing Board unanimously excluded from consideration in the licensing proceeding the issue of the environmental effects of fuel reprocessing and disposal of long lived radioactive wastes. However, the Licensing Board certified to an AEC Appeal Board questions designed to elicit a ruling as to the proper scope of environmental review to be afforded the "back end" of the fuel cycle. The Appeal Board ruled (*App.*, 76-77) that environmental effects arising from operations subsequent to the delivery of spent fuel and other wastes to either reprocessing or disposal facilities need not be considered in individual reactor licensing proceedings.

The Appeal Board reasoned that, as the only "proposed action" (NEPA, § 102(2)(C)) before the agency was the licensing of VYNPS to operate, NEPA did not require the exploration of the environmental effects of reprocessing or disposal facilities which would be the subject of separate

[9] On December 2, 1966 the petitioner, Vermont Yankee Nuclear Power Corporation, made application to the Atomic Energy Commission for a permit to construct VYNPS. After an adjudicatory hearing, the construction permit was granted on December 11, 1967. On December 31, 1969 petitioner made application for a license to operate VYNPS. On August 10, 1971 adjudicatory hearings were commenced before an AEC Atomic Safety and Licensing Board consisting of two technical members and a lawyer chairman. The hearings finally culminated in the issuance of a full power, full term operating license on February 28, 1973. The decision of the Licensing Board was affirmed as modified by an AEC Appeal Board on February 28, 1974 (ALAB-179, *supra*, n.3) (*App.*, 120). Since October 12, 1972, VYNPS had operated at full power pursuant to a temporary operating license granted under § 192 of the Atomic Energy Act (42 U.S.C. § 2242). VYNPS was the only reactor ever granted a temporary operating license under § 192 of the Atomic Energy Act; the authority granted by that statute has now expired under its terms.

licensing proceedings (*App.*, 67-68); that given the nature of the nuclear fuel cycle and the industry itself, any meaningful exploration of such effects in the context of a single reactor's licensing proceeding would not be possible (*App.*, 68-69); that a contrary ruling would require that there be an environmental analysis of the operation of every reprocessing plant or disposal facility present and future in every reactor licensing proceeding (*App.*, 69) and ". . . could as a practical matter call a halt to the licensing of individual reactors" (*App.*, 71).[10]

The VYNPS licensing hearings proceeded upon the basis of this interlocutory ruling. In the final agency action on Vermont Yankee's license the Appeal Board adhered to its prior ruling noting that its action was dictated by virtue of the pendency of rulemaking.

C. Agency Rulemaking Proceedings With Respect to Environmental Effects of the Fuel Cycle

After the Appeal Board's interlocutory decision in *Vermont Yankee*, described above, the AEC instituted a generic rulemaking proceeding to deal with the question of how environmental effects of the fuel cycle should be accounted for in the "cost-benefit analysis" necessitated in individual reactor licensing proceedings by *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

[10] After the Appeal Board's decision in *Vermont Yankee*, the AEC consistently followed the doctrine there espoused and plants continued to be licensed under the procedures laid down in the *Vermont Yankee* case. In addition, in subsequent cases Appeal Boards excluded similar issues arising out of the "front end" of the fuel cycle from individual licensing cases. *E.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53 (1973); *id.*, ALAB-156, 6 AEC 831 (1973); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-60, 5 AEC 261 (1972). See also *Ecology Action* v. *AEC*, 492 F.2d 998 (2d Cir. 1974).

To prepare for the fuel cycle rulemaking, the technical experts of the AEC's Regulatory Staff prepared a report entitled *Environmental Survey of the Nuclear Fuel Cycle* (Nov. 1972) (see *App.*, 124), which described the annual fuel cycle effects attributable to the operation of a typical light-water nuclear power plant, together with the methodology and assumptions used by the Staff in arriving at its conclusions. These conclusions were summarized in a table entitled "Table S-3" (*App.*, 127).

On November 15, 1972, the AEC published a notice of rulemaking containing Table S-3 as part of one of the alternative rules proposed to deal with the pending issue (*App.*, 125-127). The notice called for a legislative-type oral hearing at which all interested persons were invited to become parties and to comment upon the proposal (*App.*, 127-128). The Notice of Hearing (*App.*, 130-132) while precluding interparty cross-examination and formal discovery, did provide for copies of the 1972 Survey to be provided to all persons requesting same.[11]

The hearings were held February 1-2, 1973. All participants, including the respondents,[12] were afforded time to present their comments and information.[13] During the

[11] Also several weeks prior to the hearing the AEC made available in its Public Document Room the background studies, handwritten staff calculations, and superseded drafts of the Survey marked up by the AEC staff (*App.*, 137-138, 145). In addition, the only prehearing request for further documents made by any party was honored by the AEC staff (*App.*, 138 at n.2).

[12] Respondents Natural Resources Defense Council, Inc. and New England Coalition on Nuclear Pollution did not testify or participate separately. Rather they participated as constituent parts of the respondent, Consolidated National Intervenors, Inc.

[13] Testimony was presented by the United States Environmental Protection Agency, the States of New York and Minnesota, a group known as "Mapleton Intervenors", Westinghouse Electric Corporation, the Atomic Industrial Forum, a 14-member utility group, the respondents, and the technical staff of the AEC (*App.*, 136).

Staff presentation, Dr. Frank K. Pitman, Director of the AEC's Division of Waste Management and Transportation, read into the record a twenty-page statement on waste disposal and fuel reprocessing (*App.*, 25). In this statement, Dr. Pitman described the projected design parameters for a 100-year-life temporary storage facility for nuclear wastes to be utilized while ongoing studies are continued to determine the optimum method for permanent storage of such wastes (*App.*, 25-26). The conclusion of the staff experts was that the future environmental effects of the disposal of nuclear wastes were negligible (*App.*, 34).

Questioning of the participants was done by the Hearing Board (see *App.*, 136). The Board put questions on waste disposal and reprocessing to the Staff, to Dr. Pitman, and to the technical witnesses presented by respondents. Throughout the hearing the respondents insisted upon a right to cross-examination. However, at no time did the respondents attempt to show what matters they felt would be brought out by cross-examination which were incapable of presentation otherwise (*App.*, 18 at n.25, 137).

The result of the hearing and numerous posthearing filings was the promulgation on April 16, 1974 (39 Fed. Reg. 14188) by the Atomic Energy Commission of a Uranium Fuel Cycle Regulation (*App.*, 133-148) which, with minor amendments, is now codified as 10 C.F.R. § 51.20(e).

The regulation required that future Commission staff environmental impact statements prepared in connection with individual reactors include the final Table S-3 summarizing the environmental effects of the fuel cycle, and that the effects so summarized and quantified be factored as an environmental "cost" into the *Calvert Cliffs'* "cost-benefit analysis" with respect to each reactor (*App.*, 133-134, 146). The regulation also provided that no further discus-

sion of the environmental effects of the fuel cycle was required in reactor licensing proceedings, thus obviating the need for extended discussion of the environmental effects of the fuel cycle in each future reactor licensing case (*App.*, 146).

The Commission's regulation was founded upon its expert judgment as to future applications which could currently be made of existing technology (*App.*, 140). Analysis of existing technology and well established data and techniques convinced the Commission that facilities for the storage of nuclear wastes can be constructed, the use of which would have insignificant environmental effects. Recognizing, however, that the field is one of expanding technology, the Commission left open the possibility of other proceedings based upon growth in the data base.

Because the Commission found the environmental effects to be essentially insignificant, it determined that there was no reason to reopen prior cases, including *Vermont Yankee*, to restrike cost-benefit balances (*App.*, 143, 146).

D. The Decision of the Court of Appeals

In April of 1974, respondents, Natural Resources Defense Council, Inc. and New England Coalition on Nuclear Pollution, filed, in the United States Court of Appeals for the District of Columbia Circuit, a petition for review (No. 74-1385) of the Appeal Board order affirming the order of the Licensing Board which authorized the issuance of the VYNPS operating license. On July 7, 1974 respondent, Consolidated National Intervenors, Inc. filed in that same court a petition for review (No. 74-1586) of the fuel cycle rulemaking proceeding. The United States Court of Appeals for the District of Columbia Circuit had jurisdiction of these matters under the provisions of 28 U.S.C. §§ 2342,

2343. The cases were consolidated and argued together. The decision of the Court of Appeals was issued on July 21, 1976.

Relying on its prior decisions in *Scientists' Institute for Public Information (SIPI)* v. *AEC*, 481 F.2d 1079 (D.C. Cir. 1973) and *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971), the court held (*App.*, 6-44) that the portions of the agency's rule dealing with long lived waste and fuel reprocessing were invalid. This conclusion rested on a finding by the court that the rulemaking procedures were insufficient to "ventilate" the issues and create a meaningful "dialogue." Full "ventilation" arising from a meaningful "dialogue" was held to be necessary in rulemaking proceedings held in "the NEPA context." A necessary result of the invalidation of the rule was the remand of the order granting an operating license to VYNPS.

E. Results of the Decision

After issuance of the Court of Appeals' opinion and prior to issuance of any mandate, the Nuclear Regulatory Commission, reserving its right to seek further judicial review (*App.*, 149, 151), issued on August 13, 1976 a General Policy Statement (41 Fed. Reg. 34707) setting forth the Commission's response to the decision (*App.*, 149-158). The General Policy Statement requires reopening the VYNPS operating license hearing, initially for considering whether the license should be revoked or suspended pending the rulemaking proceeding (*App.*, 155); directs the Staff to prepare a new environmental survey (*App.*, 151); and declares a moratorium upon the issuance of operating licenses or construction permits pending promulgation of an interim rule expected no earlier than December of 1976 (*App.*, 152-154).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has effectively overturned the entire structure carefully established by the Nuclear Regulatory Commission for consideration of the environmental effects of nuclear waste disposal. The Commission, first by adjudication and then by rulemaking, determined the extent to which it was practical or necessary to relitigate the environmental effects of nuclear waste disposal in proceedings to license individual nuclear generating stations. The Commission also determined that more detailed consideration would be given to these environmental matters in subsequent proceedings, including consideration of individual waste disposal and reprocessing facilities. The Commission's conclusions, both in the adjudicatory and the rulemaking proceedings, are supported by evidence in the record, by the Commission's own technical expertise and broad mandate to deal with nuclear matters, and by the statutes governing the Commission's operation.

Nevertheless the Court of Appeals held that environmental effects of nuclear waste disposal must be litigated in individual generating station licensing proceedings, or, in the alternative, in a generic rulemaking proceeding which thoroughly "ventilates" the issues. The Court of Appeals further held that the rulemaking proceeding which the Commission had on the subject was procedurally — not substantively — defective because it did not provide for sufficient "ventilation" or "dialogue," even though the procedures utilized were found by the Court of Appeals to meet the minimum requirements set forth in the Administrative Procedure Act. All of these holdings are directly contrary to recent decisions of this Court and to statutory law.

I. The Court of Appeals' Decision Conflicts With Decisions of this Court as to the Proper Interpretation of the Administrative Procedure Act

The Court of Appeals found that the Commission had complied with the requirements of the Administrative Procedure Act. Nevertheless the court held that the Commission's rulemaking proceeding insufficiently "ventilated" the issues. There is, however, no basis in law for the imposition of special procedures to achieve such a goal.

The Nuclear Regulatory Commission is an agency which is not required by statute to have its rulemaking proceedings "on the record." 42 U.S.C. § 2239(a); *Siegel* v. *AEC*, 400 F.2d 778, 785 (D.C. Cir 1968). Thus the agency's generic rulemaking was governed by 5 U.S.C. § 553. *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). In *Allegheny-Ludlum* this Court held that 5 U.S.C. § 553 requires that:

> ". . . notice of proposed rulemaking shall be published in the Federal Register, that after notice the agency give interested persons an opportunity to participate in the rulemaking through appropriate submissions, and that after consideration of the record so made the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 406 U.S. at 758.

This Court held that ". . . nothing more was required." *Id.*

Allegheny-Ludlum was reaffirmed in *Florida East Coast Railway, supra,* where the Court squarely held that the requirement of a "hearing" in an agency's rulemaking statute[14] does not require that more than the minimum procedures set out in 5 U.S.C. § 553 be utilized. 410 U.S. at 240-41.

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[14] The Atomic Energy Act (§ 189) does require a "hearing". 42 U.S.C. § 2239(a).

The Court of Appeals apparently acknowledged that the governing statute was 5 U.S.C. § 553 and recognized that the minimum requirements of the statute had been complied with in the rulemaking proceeding (*App.*, 16). Nevertheless, relying on a line of its own decisions (*App.*, 16 and n.23), the Court of Appeals believed that this case was one in which ". . . procedures in excess of the bare minima prescribed by the Administrative Procedure Act, 5 U.S.C. § 553, may be required" (*App.*, 16-17).[15] The Court of Appeals held that NEPA operates, in the rulemaking context, to place an additional affirmative obligation upon an agency to assure itself that all points of view are expressed in the course of the proceedings and that no duty to take any initiative lies with any party (*App.*, 21 and n.34).

NEPA, however, imposes no such additional procedural requirements. On the contrary NEPA requires only that the agency "include" a detailed environmental impact statement in any report on major Federal action. 42 U.S.C. § 4332(2)(c). It is for the agency to determine the procedural steps necessary to satisfy this obligation. *Kleppe* v. *Sierra Club*, — U.S. —, 42 USLW 5104, 5108 (June 28, 1976). Thus proceeding from erroneous legal premises, the Court of Appeals struck down an agency rule despite the fact that the procedures utilized in promulgating the rule exceeded by a wide margin the minimum required by 5 U.S.C. § 553 as interpreted by applicable decisions of this Court

[15] The basis for these additional but undefined procedural requirements is perhaps indicated by the separate statement of Chief Judge Bazelon:

> "Decisions in areas touching the environment or medicine affect the lives and health of all. These interests, like the First Amendment, have 'always had a special claim to judicial protection.' [footnote omitted] Consequently, more precision may be required than the less rigorous development of scientific facts which may attend notice and comment procedures." *App.* at 47-48.

in *Allegheny-Ludlum* and *Florida East Coast Railway, supra.*

In fact, the Court of Appeals' repeated emphasis on "ventilation" of issues and its stated requirement that the agency conduct a "dialogue" with interested parties (*e.g.*, *App.*, 17, 19, 22, 23, 40, 41 at n.59) erect a wholly unworkable (and, in many respects, unknowable) standard.[16] In this very case, the respondents have already had a full opportunity to engage in dialogue with the agency: they received notice of the agency's hearing; they appeared at the hearing; they both offered evidence and made argument. Only the respondents' requests for cross-examination and formal discovery were denied and with respect to these no offer of proof was made nor any other indication given — beyond a general statement of counsel — as to what questions the respondents wished to put. Given this record it is difficult to know what the Court of Appeals wishes the agency to do in order to stimulate dialogue.

The decision below has thus created a wholly new set of criteria, unknown to the Administrative Procedure Act or NEPA which the parties and the agency must now struggle to understand and if possible implement. At a minimum, the Court of Appeals' standard will impose further delay on an administrative process that now approaches paralysis. In the meanwhile petitioner's operating license is explicitly held hostage.

[16] In his separate statement, Judge Tamm observed (*App.*, 54) that the repeated reference to "ventilation" of issues "means very little in procedural terms". The court itself suggested that perhaps the very same procedures might suffice if administered in "a more sensitive, deliberate manner" (*App.*, 40). However, this suggestion affords little comfort since the court provided no clearer definition of "sensitivity" than it did of "ventilation."

II. The Court of Appeals' Decision Conflicts With Decisions of this Court Interpreting the National Environmental Policy Act and Also Conflicts With Successive Acts of Congress Dealing With Nuclear Energy

The decision of the Court of Appeals conflicts with the recent decision of this Court in *Kleppe* v. *Sierra Club*, — U.S. —, 42 USLW 5104 (June 28, 1976). In *Kleppe* this Court held that the identification of areas for comprehensive environmental treatment was assigned to the special competency of the appropriate agency. *Id.* at 5111. This Court stated:

> "The procedural duty imposed upon agencies by [42 U.S.C. § 4332(2)(c)] is quite precise, and the role of the courts in enforcing that duty is similarly precise. A court has no authority to depart from the statutory language [of NEPA] and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.*" 44 USLW at 5108 (emphasis in the original).

Here the agency exercised its special competency both through the fuel cycle rulemaking and through the reservation of more specific consideration to other separate proceedings. However, in conflict with the lesson of *Kleppe*, the Court of Appeals has held that the Commission may not confine itself to the environmental effects of the proposal before it (*i.e.*, the licensing of a single generating plant) but must consider the environmental effects of the entire fuel cycle — including separately licensed reprocessing and disposal facilities — before licensing individual generating plants.

The Court of Appeals' error is compounded by the unique history of congressional regulation and oversight in the nu-

clear field. See *Union of Concerned Scientists* v. *AEC*, 499 F.2d 1069, 1079 (D.C. Cir. 1974). The creation of long lived waste as a constituent part of the spent fuel of a nuclear reactor is a scientific certainty in the operation of any fission reactor and has been since the first reactors operated in the 1940's. The creation of long lived nuclear waste was sanctioned by Congress with the passage of the original Atomic Energy Act of 1946. It was resanctioned with the passage of the Atomic Energy Act of 1954 which first authorized civilian utilization of nuclear energy. While this statute was passed years before NEPA, many of the same concerns which prompted passage of NEPA permeate provisions of the Atomic Energy Act and the regulations promulgated thereunder. *Citizens for Safe Power* v. *NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975). Finally, the continued creation of nuclear waste was again sanctioned by Congress with the passage of the Energy Reorganization Act of 1974, which contemplated the continued licensing and operation of nuclear reactors in the United States. The legislative history of the Energy Reorganization Act makes clear that Congress was well aware that the waste problem had not been fully resolved and that these wastes were hazardous. S. Rep. No. 93-980, 3 1974 U.S. Code Cong. Admin. News 5470, 5521; Conf. Rep. No. 93-1445, 3 1974 U.S. Code Cong. Admin. News 5538, 5547. Despite this, no moratorium on the licensing of nuclear power plants is declared or even suggested by the statute. On the contrary, the history of congressional action in the nuclear field demonstates a congressional policy that nuclear reactors should continue to be built and operated, and congressional acceptance of the fact that long lived nuclear waste was the inevitable result of such action.

Nevertheless, the decision of the Court of Appeals has jeopardized the future operation of VYNPS and other op-

erating reactors and has resulted in the suspension of future reactor licensing until the environmental effects associated with long lived wastes at separately licensed reprocessing and disposal facilities are fully "ventilated" for the benefit of, among others, the Congress. Thus the Court of Appeals has held that NEPA is to be read as working a massive change in congressional policy with respect to a matter as to which Congress, by law, has been kept fully informed (see *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers, AFL-CIO,* 367 U.S. 396, 408-09 (1961); 42 U.S.C. § 2016) and very recently has legislated (see, *e.g.,* The Energy Reorganization Act of 1974, 42 U.S.C. §§ 5842(3), 5842(4), 5843(b)(2)(B), 5844(b)(2)(B), 5844(c)). Neither NEPA, nor its legislative history, can be read as expressing a clear indication of legislative intent to make such a change in policy, see *Train* v. *Colorado PIRG,* 44 USLW 4717, 4723-24 (June 1, 1976). On the contrary, as this Court stated in *United States* v. *SCRAP,* 412 U.S. 669, 694 (1973), ". . . NEPA was not intended to repeal by implication any other statute." See also *Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma,* — U.S. —, 44 USLW 4954 (June 24, 1976).

III. The Decision of the Court of Appeals Improperly Disregards the Technical Judgments of the Agency and the Agency Record

The Court of Appeals' approach to the rulemaking proceeding so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Although disclaiming any intention to substitute its judgment for that of the agency (*App.,* 34), the court nonetheless remanded for further

proceedings because it found that the Commission had relied "uncritically" on "extremely vague assurances by agency personnel" (*App.,* 38). However, the Court of Appeals ignored evidence presented to the agency by respondents' own witnesses, gratuitously and improperly raised the question of Dr. Pitman's credibility (*App.,* 25 at n.43), and assumed contrary to the fact that no questions had been asked of Dr. Pitman (*App.,* 34 and at n.53, 41 at n.59).[17]

The court based its disagreement and rejection of Dr. Pitman's testimony in part, upon articles authored after the case was argued in the Court of Appeals (*App.,* 27 at n.46; 28 at n.47; 33 at n.51) with no opportunity for Dr. Pitman or the parties to the proceeding to respond. This is in clear conflict with the principle that "[t]he focal point for judicial review should be the administrative record already in existence, not some new record initially made in the reviewing court," *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326 (1976).

The Court of Appeals simply refused to accept the judgment of the Nuclear Regulatory Commission, an expert agency created as part of ". . . a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency." *Siegel* v. *AEC, supra,* 400 F.2d at 783. The agency had found that an expansion of the "proposed action" before it to permit litigation of the entire fuel cycle in individual reactor licensing cases was unworkable and would lead to the complete collapse of individual licensing proceedings. The agency further found that engineering and design techniques already exist which assure that facilities can be constructed

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[17] In fact, the record reveals that a number of questions were put by the hearing board to Dr. Pitman. *Uranium Fuel Cycle,* AEC Dkt. No. RM-50-3, Transcript pp. 199-205 (Feb. 1, 1973).

which will limit fuel cycle environmental effects to the insignificant levels set out in Table S-3 (*App.*, 140, 143). There is no basis in the record or in law for the Court of Appeals' rejection of either of these judgments of this expert agency. *Kleppe* v. *Sierra Club, supra,* — U.S. at —, 44 USLW at 5110. And yet, the Court of Appeals has by its rejection of these judgments, placed in jeopardy outstanding construction permits and operating licenses, and in addition assured a delay in the issuance of any new such permits or licenses, all of this at a time when the United States, as a matter of national policy, is seeking energy independence (see 42 U.S.C. § 5801) especially in the form of reducing reliance on expensive imported oil.

CONCLUSION

The impact of the Court of Appeals' decision extends far beyond the harm to the petitioner arising from the prospect of further proceedings in a matter in litigation for over five years. It extends beyond the potential injury to the energy poor New England Region from a challenge to the continued operation of a power plant which has been operating as a significant non-oil-burning source of electrical energy in this area since 1972. The Court of Appeals' decision in fact will delay the future utilization of nuclear power in the entire United States. It has already resulted in the imposition of a moratorium on future licensing of nuclear power plants (*App.*, 152-154) at least until the erroneous standards of the Court of Appeals are satisfied.[18]

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[18] The Nuclear Regulatory Commission obviously is trying to shorten the moratorium through the device of using an "interim rule" as of December 1976 (*App.*, 152-154). However there is no guarantee that the Court of Appeals, upon the inevitable appeal, will not find the "interim rule" equally wanting especially in light of the fact that the Commission contemplates issuing it without any hearings or "dialogue". (*App.*, 154).

Nor are the harmful consequences of the Court of Appeals' decision confined to the nuclear area. If allowed to stand, the decision below will have far reaching impact on the conduct of all agency rulemaking proceedings under 5 U.S.C. § 553, and is likely to result in virtual paralysis of procedures which Congress intended to be used by an agency for expeditious resolution of issues before it.

The petition for certiorari should therefore be granted. Indeed, so clear is the error of the Court of Appeals, we believe the appropriate relief would be the summary reversal of the decision.

Respectfully submitted,

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